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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	))))	CC Docket No. 96-128

REPLY COMMENTS OF EXCEL COMMUNICATIONS, INC.

Excel Communications, Inc. ("Excel"), through undersigned counsel and pursuant to the Public Notice released by the Federal Communications Commission ("Commission") on October 20, 1997, hereby submits its Reply Comments in the above-captioned proceeding. Specifically, Excel agrees with the Comments of the interexchange carriers ("IXCs") that oppose granting LECs the waivers at issue without prohibiting noncomplying payphones from receiving compensation. As an IXC that is to a significant extent dependent upon its underlying carriers to track the payphone calls it carries, Excel has been involved in the effort of its primary underlying carrier, WorldCom, in its development of a system to track and pay per-call. The major facilities-based carriers, such as WorldCom, have relied on the Commission's Payphone Orders[1] in developing these systems and therefore, have relied on receiving these coding digits as an essential element in their tracking systems.

In contrast to the IXCs, it is evident from the LEC comments that they have made minimal efforts to date to upgrade their systems to transmit these coding digits. Although the LEC comments

[1] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996); Order on Reconsideration, 11 FCC Rcd 21233 (1996); Second Report and Order, FCC 97-371 (rel. Oct. 9, 1997) (collectively, the "Payphone Orders").

discuss the short term costs of upgrading their systems, they fail to mention any specific steps they have taken to ensure that they would be able to comply with the Payphone Orders by transmitting coding digits as of October 7, 1997. For this lack of effort the Common Carrier Bureau ("Bureau") has granted the LECs a blanket waiver allowing them additional time to upgrade their systems while still receiving compensation for payphone calls carried by noncomplying phones.[2] Excel agrees with the IXCs that the grant of such a waiver is contrary to the public interest because it both rewards the LECs for noncompliance with the Commission's Payphone Orders and undermines the competitive marketplace the Payphone Orders sought to establish.

I. THE LECS FAIL TO MEET THE COMMISSION'S WAIVER STANDARDS

It is well established that waiver of the Commission's rules is only appropriate if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.[3] As noted by the IXC commenters, the LEC waiver requests fail both prongs.

First, the LECs have argued that good cause exists for a waiver because the issues are technically complex and because the transmission of payphone-specific coding digits is not yet ready for implementation for certain phones.[4] Neither the technical complexity nor the inability of the LECs at this time to transmit coding digits should constitute a "special circumstance" deserving a waiver.

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[2] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-2162 (CCB Oct. 7, 1997) ("Waiver Order").

[3] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[4] Comments of NECA at 1; Comments of RBOC/GTE/SNET Payphone Coalition at 2.

In its Order on Reconsideration, the Commission plainly ruled that to be eligible for per-call compensation, "payphones will be required to transmit specific payphone coding digits as part of their ANI."[5] Because the Commission correctly made the transmission of such codes a prerequisite to receiving compensation, it obviously recognized that some payphones may be unable to transmit the coding digits and would be ineligible for compensation. The rule the Commission established, therefore, prohibits payphone owners from receiving compensation for phones that fail to transmit the required coding digits.

The LECs have demonstrated no reason, other than their own lack of diligence, as to why they are unable to transmit such codes. For example, neither the RBOC/GTE/SNET Payphone Coalition comments nor the comments of the other LECs even attempt to argue that the LECs have faithfully attempted to upgrade their systems to enable them to transmit coding digits on all of their phones. To the contrary, in its Comments, SNET revealed that it did not take any steps to implement a system to transmit coding digits until April, 1997.[6] Most telling are APCC's comments, which recognize that instead of working to upgrade their systems, "[t]he LECs took the position that the Payphone Order in no way required any alteration of the plans they had made to implement a different Commission order regarding payphone ANI digits."[7] As noted by numerous IXC commenters, it was only when per-call compensation was about to begin that the LECs finally admitted that they had taken little action to upgrade their systems and were therefore, unable to comply with the

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5 Order on Reconsideration, at ¶ 64.

6 SNET Comments at 5.

7 APCC Comments at 9.

Commission's Payphone Orders.[8]

The LECs' inability to transmit the required coding digits on 40% of their phones is unconscionable and should under no circumstances constitute "special circumstances" justifying grant of a waiver. The LECs had been aware of this requirement since last fall. The Order on Reconsideration adopted on November 8, 1996, left no doubt that the LECs were required to transmit these coding digits to be eligible for compensation. The LECs never appealed that requirement, nor did they give IXCs any indication prior to their waiver requests less than one week before the commencement of per-call compensation that they would be unable to comply for a sizable portion of their phones.

In contrast, as demonstrated in their Comments, IXCs have expended millions of dollars devising systems to be able to track and pay for payphone calls on a per-call basis.[9] In formulating these systems, the IXCs reasonably relied on the transmission of these coding digits from the LECs. Plainly it would at this point be unacceptable for the IXCs to receive a waiver from payphone compensation if they had failed to devise a system enabling them to track calls. Under the same standard, the LECs' waiver must also be denied.

Importantly, grant of the waiver is contrary to the public interest, because it severely undermines the competitive payphone environment the Commission sought to create. In response to IXC claims that the Commission's per-call scheme would overcompensate payphone owners for 800 calls, the Commission stated in its Order on Reconsideration that "those carriers that are concerned about overcompensating PSPs for subscriber 800 calls have substantial leverage, by way

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[8] See MCI Comments at 4-5; Frontier Comments at 3; WorldCom Comments at 4.

[9] *See* MCI Comments at 4; WorldCom Comments at 4.

of the ability to block these calls, to negotiate with PSPs . . . ."[10] The Bureau's waiver, however, will require IXCs to pay compensation to 40% of payphones *without* the ability to block those calls on a real-time basis. Indeed, Excel's primary underlying carrier, WorldCom, has informed it that without the coding digits, WorldCom will be unable to block calls from the affected phones. This will detrimentally affect Excel and its customers because as a reseller, Excel is dependent upon underlying carriers to track its payphone calls. Accordingly, if WorldCom is unable to appropriately track and block, these functions will also be unavailable to Excel.

The inability to block payphone calls removes the only bargaining tool IXCs have to help ensure that the payphone market is competitive. Without the ability to block, IXCs have no way to shield 800 customers from receiving unwanted calls from payphones. Because IXCs will not be able to accurately pass through its payphone charges, IXCs will have to raise rates for all 800 subscribers to cover the significant costs that will be imposed by the payphone compensation system. Across the board rate increases without the ability to direct those costs to the customers with higher payphone traffic is certainly contrary to the public interest.

Indeed, it seems to Excel that the only " interest" that benefits from the LECs' inability to transmit coding digits on a substantial portion of their phones are the LECs themselves. The lack of coding digits ensures them more compensation because 800 customers will be unable to block calls from 40% of the payphones. It is no secret in the industry that this constitutes substantial revenue. As one analyst noted, the per-call compensation "will help all pay-phone providers, most of which

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[10] Order on Reconsideration, at ¶ 71.

are the Bell companies, 'get to the level of profitability that they haven't seen in decades.'"[11] The LECs should not be able to benefit in this manner from their inexcusable failure to comply with the Commission's Payphone Orders.

II. THE ONLY ACCEPTABLE RESOLUTION OF THE LEC WAIVER REQUESTS IS TO DENY COMPENSATION FOR THOSE PAYPHONES UNABLE TO TRANSMIT CODING DIGITS

As demonstrated above, and as noted by other commenters, the LECs actually benefit financially from their failure to comply with the Commission's rule if they are permitted to continue to receive compensation for phones that fail to comply.[12] In order to ensure that the LECs take steps to expeditiously comply with the Commission's requirements, the Commission must adhere to its own Order on Reconsideration and prohibit those phones from receiving compensation. Otherwise, until the LECs finally comply they will be rewarded for their disregard of the Commission's rules and processes, while the IXCs, who actually expended millions of dollars to comply with the Commission's Payphone Orders, will be penalized because they will be required to compensate LECs for unwanted payphone calls they are unable to block.

This result in fundamentally unfair to the carriers that attempted to follow the Commission's Payphone Orders. If it is true that LECs are unable to transmit coding digits for 40% of their phones, they must bear the burden of their failure to comply. Thus, if the Commission decides to grant the LECs the requested waiver, the Commission must prohibit the LECs from receiving compensation for those payphones that fail to comply. This will protect the public interest and will give the LECs

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[11] *FCC Revises Rates Companies Must Pay on Access-Code Calls*, Wall Street Journal, October 10, 1997, at A4.

[12] *See* Sprint Comments at 2-3; WorldCom Comments at 11.

the proper incentives to promptly complete their obligations.

With regard to the Independent PSPs, Excel agrees that it would be inequitable to deprive them of compensation because of the LECs' failure to comply with the Commission's rules. However, it would be equally inequitable to require the burden of the LECs' noncompliance to be placed on the IXCs. Accordingly, the Independent PSPs that are harmed by the LEC delays should be permitted to seek damages from the LECs for their loss in compensation.

III. CONCLUSION

For the reasons provided above, Excel respectfully agrees with the IXCs that the LECs should not be permitted to receive compensation for payphones that fail to comply with the Commission's Payphone Orders. The Commission must not punish the IXCs and their customers for the LECs' blatant failure to comply with the Commission's clearly defined, year-old requirements.

Respectfully submitted,

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Dated: November 6, 1997

CERTIFICATE OF SERVICE

I, Jolanda Tedford, hereby certify that a copy of the foregoing **Reply Comments of Excel Communications, Inc. CC Docket No. 96-128** was sent to each of the following parties by hand delivery (denoted with asterisk) and regular mail on this 6th, day of November, 1997.

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